Filed 8/26/15 Bednarski v. Barnard CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

PAUL BEDNARSKI et al,

Plaintiffs and Respondents.

v.

LAURA BARNARD,

Defendant and Appellant.

G050154

(Super. Ct. No. 30-2009-00285660)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Kim R. Hubbard, Judge. Affirmed. Motion to dismiss denied.

Laura Barnard, in pro. per., for Defendant and Appellant.

Westover & Westover, Barrett E. Westover and Harry E. Westover for Plaintiff and Respondent Paul Bednarski.

Serbin & Carmeli and Michele Carmeli for Plainttif and Respondent Robert Esquinas, Jr.

* * *

Laura Barnard appeals from the trial court's postjudgment order denying her ex parte motion to waive her obligation to post a bond to stay on appeal enforcement of the court's earlier orders concerning the administration of her late father's revocable living trust. She contends she had "an absolute right" to the waiver because of her "*in forma pauperis* status." As we explain, the trial court did not err in denying her belated motion.

I

FACTUAL AND PROCEDURAL BACKGROUND

The parties fail to include in their slim appellate appendices any of the underlying judicial decisions, including the final judgment and order or orders that the parties agree required Barnard to post an undertaking to stay enforcement pending her multiple appeals. As best we can discern, it appears Barnard and her brother, Robert Esquinas, Jr., are embroiled in a dispute over administering their late father's trust, which has resulted in at least two other pending appeals, case numbers G049113 and G049482, plus this appeal in which Barnard challenges the trial court's denial of her motion to waive the undertaking while she pursues those two appeals. Though they have each been pending for more than a year, no record has yet been filed in either G049113 or G049482, so those cases are no help to us in illuminating the underlying issues in the judgment or orders that require the undertaking for which Barnard now seeks a waiver. Based on the limited record furnished by the parties, our sketch of the underlying issues is therefore cursory and solely for the purpose of addressing the issues raised in this appeal.

Briefly, it appears the underlying sibling dispute resulted in a judgment in August 2013 rejecting Barnard's contention she was entitled under the trust to a life estate in her father's San Clemente home. The judgment also directed that the home be prepared for sale. Although respondent Paul Bednarski was the interim trustee at the time of this decision, he makes no mention of it in his respondent's brief, which lacks record references, appears significantly inflated in length, and adds little to our

understanding of the issues. In any event, Barnard appealed the August 2013 decision in G049113, which remains pending in this court awaiting a record and briefing.

Next, it appears the trial court entered in December 2013 a postjudgment order in which the court accepted Bednarski's resignation as interim trustee, appointed a receiver, Timothy O'Brien, for the trust's assets, and directed the receiver to take all necessary steps to sell the San Clemente home, including evicting Barnard and retaining a real estate agent. Barnard appealed that decision in G049482, which is also awaiting a record and briefing.

The substance of *this* appeal involves Barnard's successive ex parte motions in May 2014 to set aside the undertaking apparently required by the August and December 2013 court decisions. In an initial ex parte on May 8, 2014, Barnard recognized her "obligation of posting an undertaking bond," but sought a waiver because "[i]t would be impossible for her to do so, as an indigent." Barnard relied on the trial court's inherent authority at common law to waive security or other bonds, now codified in Code Civil Procedure, section 995.240 ["court may, in its discretion, waive a provision for a bond"].[1] Barnard did not address section 918, which provides that where an undertaking is required, the trial court lacks authority to stay enforcement of the underlying judgment "for more than 10 days beyond the last date on which a notice of appeal could be filed." (§ 918, subd. (b).) The trial court denied Barnard's bond waiver motion.

A few days later on May 12, 2014, Barnard refiled largely the same motion, which the trial court again denied. The trial explained in a written notation on Barnard's proposed bond waiver order: "Denied. This the same application that was brought last week and is no more timely now than it was then. However, sanctions are denied as

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1 All further statutory references are to the Code of Civil Procedure.

Robert Esquinas has not followed the procedures set forth in CCP section 128.7." Barnard now appeals.

II

DISCUSSION

As a preliminary matter, Esquinas filed a motion to dismiss the appeal, which we deny because it merely restates his position in his respondent's brief on the issues in the appeal, to which we now turn. First, Esquinas contends that because Barnard appealed from the trial court's second order denying her waiver motion on May 12, 2014, and did not appeal from the denial of her motion on May 8, 2014, her appeal must be dismissed because her second motion was effectively a motion for reconsideration, which is not appealable. (§ 1008, subd. (g).) But respondents offer no authority or argument to suggest the first order was not appealable as an order after judgment. (§ 904.1, subd. (a)(2).) Although Barnard appealed from the wrong order, it did not render her appeal untimely, and we consider her appeal as if it designated both the first and second order. (*Passavanti v. Williams* (1990) 225 Cal.App.3d 1602, 1609 & fn. 7 [reviewing courts must construe a notice of appeal liberally in favor of its sufficiency].)

Second, Esquinas argues the appeal must be dismissed as moot because the sale of the San Clemente home, which was pending in March 2015 when he filed his respondent's brief, has now been completed. He requests judicial notice of the newly filed grant deed and the trial court's order confirming the sale. Esquinas's request for judicial notice, however, does not moot Barnard's appeal. Simply put, because neither Esquinas nor any other party has provided the underlying judgment and orders that the parties agree required an undertaking bond, we cannot determine whether the sale of the home moots Barnard's appeal from the trial court's postjudgment order declining to waive the bond. For all we know, there may be issues in the underlying judgment or orders currently on appeal in G049113 or G049482 that are not mooted by the sale of the

home, and therefore Barnard's request for a bond waiver may not be moot. Based on the state of the record, which Esquinas and Bednarski did nothing to address, we reject the mootness argument.

On the merits, Barnard contends the trial court erred by denying her ex parte request for a waiver of an undertaking bond. The party seeking relief from a bond bears the burden of proof, and we review the trial court's decision for abuse of discretion. (*Williams v. Freedomcard, Inc.* (2004) 123 Cal.App.4th 609, 615.)

Barnard relies on section 995.240, which allows for a bond waiver in cases of indigency. But the waiver is not automatic, as Barnard asserts. Section 995.240 codifies the judicial branch's common law authority to waive a bond. (*Smith v. Adventist Health System/West* (2010) 182 Cal.App.4th 729, 740 & fn. 9.) The statute provides: "The court may, *in its discretion*, waive a provision for a bond in an action or proceeding and make such orders as may be appropriate as if the bond were given, if the court determines that the principal is unable to give the bond because the principal is indigent and is unable to obtain sufficient sureties, whether personal or admitted surety insurers. *In exercising its discretion the court shall take into consideration* ***all*** *factors it deems relevant*, including but not limited to the character of the action or proceeding, the nature of the beneficiary, whether public or private, and the potential harm to the beneficiary if the provision for the bond is waived." (§ 995.240, italics and boldface added.)

Respondents rely on section 918, subdivision (b) [hereafter § 918(b)], which provides that a trial court has no power after a certain period of time to stay enforcement of a judgment where an undertaking is required, absent consent from the affected party. The statute provides: "If the enforcement of the judgment or order would be stayed on appeal only by the giving of an undertaking, a trial court *shall not have power*, without the consent of the adverse party, *to stay the enforcement thereof* pursuant to this section for a period which extends for more than 10 days beyond the last date on which a notice of appeal could be filed." (§ 918(b).) There is no question Barnard's

waiver motions fell far outside the usual period of 70 days in which to seek a stay, i.e., 60 days to file an appeal (Cal Rules of Court, rule 8.104), plus the 10 additional days in which to seek a bond as authorized by § 918(b). She filed her waiver motions in May 2014, long after the August 2013 judgment and December 2013 postjudgment order for which she sought waiver of an undertaking bond. It would be anomalous for the trial court — after 70 days — to be able to waive entirely an undertaking requirement when the Legislature has expressly provided in § 918(b) that the court lacks authority to stay enforcement of the judgment beyond 70 days.

Even assuming arguendo the trial court has that authority, the court here did not abuse its discretion in denying Barnard's request for a bond waiver. As noted, under § 918(b), the trial court only has authority to enter a *temporary* stay of enforcement that extends no longer than 10 days after a litigant's last day to appeal. Thereafter, to extend the stay of enforcement, the litigant must seek a writ of supersedeas from the court of appeal. (§ 923.) Because of the delay that may be involved in an appeal, particularly here where it has been more than a year and Barnard still has not filed the record in her underlying appeals, a writ of supersedeas may be the more prudent course than a bare appeal of the trial court's denial of a bond waiver motion. A stay obtained by a writ of supersedeas, however, requires not only a showing of irreparable harm to the appellant, but also that "the underlying appeal is meritorious." (Moore & Thomas, Cal. Civ. Prac. Procedure (May 2015) Stay of Enforcement, § 36:44.)

Barnard did not seek a writ of supersedeas in this matter, but it follows that if a litigant must demonstrate some merit to an appeal before obtaining a stay, the trial court is entitled to consider the potential merit of an appeal in evaluating whether to waive an undertaking altogether. After all, section 995.240 expressly provides that "[*i*]*n exercising its discretion*" whether to grant a bond waiver, "*the court shall take into consideration* ***all*** [relevant] *factors*." (§ 995.240.) Here, where nothing in Barnard's

bond waiver motions or anywhere in the record on appeal suggests potential merit in her appeals, the trial court did not abuse its discretion in denying the motions for a waiver.

III

DISPOSITION

The trial court's order denying Barnard a waiver of her obligation to post an undertaking on appeal is affirmed. The parties shall bear their own costs on appeal.

ARONSON, J.

WE CONCUR:

MOORE, ACTING P. J.

FYBEL, J.